No. 73-1756

FILED
NOV 8 1974
MICHAEL ROBAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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RUTH E. BIDDLE, *Administratrix, Petitioner*

v.

JOHN S. BOWSER, *Respondent*

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## PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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JOHN O. HARPER
*Attorney for Petitioner*

10560 Main Street
Suite 410
Fairfax, Virginia 22030

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## PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

*To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

Comes now the petitioner and presents this petition for a rehearing on her Writ of Certiorari to the Court of Appeals for Montgomery County, Ohio, filed in this case.

### JURISDICTION

The Petition for Writ of Certiorari was filed on May 23, 1974, and denied by this Court on October 15, 1974. This Petition for rehearing is filed within twenty-five days from October 15, 1974, in accordance with Rules 58 of this Court.

## REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioner reiterates each and every ground set forth in the original petition, and further suggests to the Court the matters hereinafter discussed.

On April 24, 1974, United States Supreme Court decided the case of *Dave Pernell, Petitioner* v. *Southall Realty,* US , 40 L Ed 2d 198, 94 S Ct. The instant case and the *Pernell* case can be distinguished on the basis that the Seventh Amendment right to a jury trial was considered in *Pernell,* whereas the respondent in this case alleges a violation of her procedural due process rights, under the Fourteenth Amendment and cannot allege denial of the jury trial, because she did not ask for it below. However, the significance of *Pernell v. Southall Realty* to *Biddle* v. *Bowser* is that, in the *Pernell* case the Court is, for the first time, considering the constitutionality of a law of the District of Columbia, touching on civil procedure in the local court. Similarly in the case of *Biddle* v. *Bowser,* the Supreme Court of the United States is asked to consider the constitutionality of the interpretation of the new Ohio rules of civil procedure, as interpreted by the highest court of that state.

The United States Supreme Court, in *Pernell* v. *Southall Realty* analyzed, in detail, those forms of action which came within the purview of the Seventh Amendment: "We recently had occasion to note that while 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time.' *Curtis* v. *Loether,* US , , 39 L Ed 2d 260, 94 S Ct 1005 (1974). The phrase 'suits at common law' includes not only suits

> 'which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights

were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies administered.... In a just sense, the amendment then may be considered to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' *Parsons* v. *Bedford*, 3 Pet 433, 447, 7 L Ed 732 (1830) emphasis in original).

Whether or not a close equivalent to § 16-1501 existed in England in 1791 is irrelevent for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty. See *Curtis* v. *Loether, supra,* US, at , 39 L Ed 2d 260." *Pernell* v. *Southall Realty*, infra, 40 L Ed 2d, at 208-209. Mr. Justice Marshall, in further analyzing the District of Columbia statute drawn into question in the *Pernell* case, stated: "In contrast, § 16-1501 is not a criminal action intended to redress the use of force, but rather was designed as a general civil remedy to determine which of two parties has the better legal right to possession of real estate. And, in this respect, § 16-1501 is not limited, as was the 1864 Act, to landlord-tenant disputes, but has been held to encompass, for example, suits by a purchaser at a foreclosure sale to evict the former owner, *Glenn* v. *Mindell*, 74 A2d 835 (DC Mun App 1950); *Surratt* v. *Real Estate Exchange*, 76 A2d 587 (DC Mun App 1950); *Sayles* v. *Eden*, 144 A2d 895 (DC Mun App 1958), by the heir of property to evict the current occupant, *Mahoney* v. *Campbell*, 209 A2d 791 (DC Ct App 1965), and by a tenant in common seeking to share possession of the premises, *Bagby* v. *Honesty*, 149 A2d 786 (DC Mun App 1959)." *Pernell* v. *Southall Realty*, infra, 40 L Ed 2d, at 211.

Of course, in the trial of *Biddle* v. *Bowser*, in the Mont-

gomery County, Ohio Court of Common Pleas, the trial judge acted as both the trier of fact and the trier of law. The decision and entry by the trial court are listed as Appendices A and B, pages 16-19 of the Petition for a Writ of Certiorari, filed in the instant case. As noted, a final summary judgment and a permanent injunction were awarded to John S. Bowser, the defendant below and the respondent in this Court. This judgment and entry was made by the trial court, the Common Pleas Court of Montgomery County, Ohio, based on only the pleadings and affidavits attached thereto. No evidentiary hearing, of any type, was held by the trial court, prior to said election and entry.

Your petitioner is well aware of this Court's "reluctance to review decisions... involving matters peculiary local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell* v. *Southall Realty*, infra, page 204. Petitioner contends, however, that her treatment at the hands of the Court of Common Pleas of Montgomery County, Ohio, falls within that exception of a "local law matter... where egregious error has been committed". *Pernell* v. *Southall Realty*, infra, page 205.

Petitioner contends that, by so acting, the Common Pleas Court of Montgomery County, Ohio, nullified her rights in direct contradiction to the United States Constitution, by not only granting a summary judgment to the defendants, but permanently enjoining her, forever, to proceed under the revised rules of civil procedure of the State of Ohio without an evidentiary hearing or trial on the merits. In summary, your petitioner contends that the present posture of her case creates a substantial and controlling circumstance entitling her to a rehearing of the judgment of this Court denying her Petition for Writ of Certiorari. *Sanitary Refrigerator Company* v. *Winters*, 280 U.S. 3, 34, footnote 1, 50 S. Ct. 9,10 (1929).

## CONCLUSION

For the foregoing reasons, your petitioner respectfully urges that a rehearing be granted, that upon further consideration of the order of October 15, 1974, denying the Petition for Writ of Certiorari, be revoked, and that a writ of certiorari issue; or, in the alternative, that this Court remand this matter to the United States District Court, Dayton, Ohio, for an appropriate hearing on the permanent injunction entered by the Court of Common Pleas, Montgomery County, Ohio.

JOHN O. HARPER

I, John O. Harper, of counsel for the petitioner, Ruth Biddle, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay. Further, I hereby certify that the petition for rehearing is restricted to the grounds above specified.

JOHN O. HARPER
Attorney for Petitioner
10560 Main Street
Fairfax, Virginia 22030

MASON DOUGLAS, Esquire
1005 Gem City Bldg.
Dayton, Ohio 45402
Attorney for Respondent

## APPENDIX

### § 16-1501. DEFINITION; summons

When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of possession. (Dec. 23, 1963, 77 Stat. 581, Pub. L. 88-241, § 1, eff. Jan. 1, 1964; July 29, 1970, Pub. L. 91-358, title I, § 145(g)(1), 84 Stat. 560.)